

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	Criminal No. 2006-80
GELEAN MARK,)	
VERNON FAGAN,)	
WALTER ELLS,)	
DORIAN SWAN,)	
KELVIN MOSES, and)	
HENRY FREEMAN,)	
)	
Defendants.)	
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ATTORNEYS:

Delia L. Smith, AUSA

St. Thomas, U.S.V.I.

For the Plaintiff,

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St. Croix, U.S.V.I.

For defendant Gelean Mark,

Michael L. Sheesley, Esq.

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For defendant Vernon Fagan,

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For defendant Walter Ells,

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For defendant Dorian Swan,

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Andrew L. Capdeville, Esq.
St. Thomas, U.S.V.I.
For defendant Kelvin Moses,

Dale L. Smith, Esq.
New York, NY
For defendant Henry Freeman.

ORDER

GÓMEZ, C.J.

Before the Court is the motion of defendant Henry Freeman ("Freeman") to exclude the trial testimony of a confidential informant for the government (the "informant"), as well as recorded conversations between the informant and his co-defendants, pursuant to Federal Rule of Civil Procedure 16 ("Rule 16"). Additionally, Freeman moves to sever his trial from the trial of the other co-defendants, or, alternatively, to continue the trial.

On December 19, 2006, the Grand Jury returned an indictment charging Freeman with conspiracy to possess with intent to distribute cocaine and possession of cocaine on board an aircraft. On June 6, 2007, Freeman requested disclosure of all tapes of recorded conversations involving any of the defendants in this matter. On July 26, 2007, Freeman filed a motion to compel the government to produce discovery materials. At a suppression hearing conducted on August 22, 2007, Freeman again

requested production of tape recorded conversations involving the defendants.

The government provided the tape recordings to Freeman on August 30, 2007. Among the recordings produced by the government were conversations between the informant and Freeman's co-defendants. Freeman was not a party to any of the recorded conversations produced by the government.

After Freeman received the recorded conversations on August 30, 2007, Freeman filed the instant motion. The trial in this matter commenced on September 5, 2007.

Freeman argues that the government willfully failed to produce the recordings of the conversations involving the informant, in violation of Rule 16.

Pursuant to Rule 16:

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E) (2002). Before the government is required to produce evidence under Rule 16, the defendant bears

the burden of making a *prima facie* showing that such evidence is material to the defense. "Materiality means more than that the evidence in question bears some abstract logical relationship to the issues in the case. . . . There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor." *United States v. RMI Co.*, 599 F.2d 1183, 1188 (3d Cir. 1979) (quoting *United States v. Ross*, 511 F.2d 757, 762-63 (5th Cir.), *cert. denied*, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975)).

Here, Freeman has identified only potential uses of recorded conversations between an informant and a co-defendant generally. Freeman has not even attempted to show that the specific conversations contained in the recordings would in any way alter the quantum of proof in his favor. Therefore, Freeman has failed to meet his burden of showing that the recorded conversations between the informant and his co-defendants are material to the preparation of his defense and therefore required to be produced under Rule 16. *See, e.g., United States v. Persico*, 447 F. Supp. 2d 213, 217 (E.D.N.Y. 2006) (holding that the defendants were not entitled to discovery of items such as electronic surveillance recordings and reports because the requests for such items were based on nothing more than

conjecture that impeachment or exculpatory information might be embedded therein). Freeman has not shown that the government violated its discovery obligations under Rule 16.

Freeman's arguments for exclusion of evidence at trial, including the informant's trial testimony; for severance; or for a continuance, are contingent on the Court first finding that the government violated Rule 16 by failing to timely produce the recorded conversations between the informant and his co-defendants.¹ Since Freeman has failed to show that a Rule 16 violation occurred, it is hereby

ORDERED that Freeman's motion is **DENIED**.

Dated: September 25, 2007

S_____
CURTIS V. GÓMEZ
Chief Judge

¹ Freeman presumes that the government violated Rule 16 by failing to timely provide him with the recorded conversations between the informant and his co-defendants. He further presumes that the Court would elect to exclude the trial testimony of the informant based on the purported Rule 16 violation. Based on these two incorrect presumptions, Freeman claims that severance is required to protect his right to cross-examine the informant. Alternatively, Freeman has argued that a continuance of the trial would have been necessary to enable him to adequately prepare for trial in light of the purported Rule 16 violation.

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